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No. 07-717

Supreme Court, U.S.
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In The

Supreme Court of the United States

Lorena Minix, et al.,

Petitioners,

v.

JELD-WEN, inc

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeal
for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented a compelling reason for this Court to grant review of the Eleventh Circuit's decision when there is no conflict between the decision and either a decision of this Court or of a federal court of appeals, and no departure from the law of harassment and an employer's affirmative defense as it has developed from this Court's seminal decisions in Burlington Indus. v. Ellerth, 524 U.S. 742, 760-65 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Sup. Ct. R. 29.6, JELD-WEN, inc. is privately held and no publicly held corporation owns 10% or more of its stock. Furthermore, none of JELD-WEN, inc.'s subsidiaries, conglomerates, affiliates or parent corporations are publicly traded.

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INTRODUCTION

Petitioners assert two intertwined bases upon which they contend this Court should grant certiorari review based on how the Eleventh Circuit and the district court interpreted the notice requirement of the Farragher/Ellerth affirmative defense in a supervisor sexual harassment action devoid of any tangible employment action. First, Petitioners contend that the Eleventh Circuit's decision conflicts with the decisions of other Courts of Appeal. However, a comparison of the other circuits' decisions with Eleventh Circuit precedent reveals that there is no such conflict. Second, Petitioners generally argue that the Eleventh Circuit has foreclosed constructive notice as a means for an employer to have notice of alleged harassment. Again, a review of Eleventh Circuit precedent reveals that the cases do not support Petitioners' contention. Accordingly, the writ is due to be denied.

STATEMENT OF THE CASE[1]

The three Plaintiff-Petitioners ("Plaintiffs") are former employees of Respondent JELD-WEN, inc.'s ("JELD-WEN") Roanoke, Alabama facility who were employed there until the facility closed in late 2004. Each Plaintiff first reported allegations of sexual harassment by their immediate supervisor, Group Manager Richard Fetner, in a meeting with Dan Hees, a JELD-WEN Coordinating General Manager, on the morning of October 13, 2004. Before noon on that same day, Hees met with the alleged harasser and his JELD-WEN employment ended during the meeting.

JELD-WEN has a policy that prohibits harassment, providing in relevant part:

> JELD-WEN strives to provide a productive and comfortable working environment free from harassment or discrimination including that which may be construed to be offensive sexual

[1] As this case was disposed per a Fed. R. Civ. P. 56 Motion for Summary Judgment, the facts are stated herein in the manner most favorable to the Petitioner/Plaintiffs as required by Fed. R. Civ. P. 56. Respondent does not concede any fact and it is noted that several primary witnesses generally denied the Plaintiffs' allegations during discovery. Furthermore, in rebuttal to Plaintiffs' factual representations per S. Ct. R. 15(2), Plaintiff Minix did not report Bowers's conduct; she only requested to be moved without explaining the basis for the request. She also did not work with Bowers for two weeks after the report as she was on vacation and on holiday [i.e., July 4th] during most of that time.

conduct. This policy applies to every aspect of the employment relationship throughout the organization and to the dealings of employees with one another, as well as with vendors and customers.

Harassment in any form will not be tolerated by the company. Any employee who violates this policy is subject to discipline up to and including discharge.

* * *

Employees will be made aware of this policy and are encouraged to not tolerate harassment. Any employee who believes that he/she is being subject to objectionable conduct should promptly notify either their immediate Supervisor, their General or Corporate Manager, Vice President or Subsidiary President, or the Legal Department at (541) 882-3451. Any Supervisor, General or Corporate Manager, Vice President or Subsidiary President, who has questions concerning harassment complaints shall contact the Legal Department.

* * *

Every complaint of harassment will be investigated promptly, thoroughly, fairly and objectively.

* * *

> If the information collected during the investigation establishes that harassment or other objectionable conduct did occur, disciplinary action will be promptly taken against the harasser, up to and including termination if appropriate. Employees will not be discriminated or retaliated against for reporting harassment or participating in an investigation.

(emphasis added). There is no claim in this matter that JELD-WEN's policy is defective in any fashion. Although it is unclear why Plaintiffs waited such a long period of time to actually report the alleged conduct, it is undisputed that they were aware of JELD-WEN's policy and the procedures to report the alleged conduct. In fact, outside persons (EEOC representatives, attorneys and others) advised each plaintiff that the conduct should be reported per the provisions of JELD-WEN's policy long before the October 13th report and at least one Plaintiff testified that she knew that she was supposed to report the conduct to Mr. Hess.

Because JELD-WEN's policy is effective and because JELD-WEN acted promptly and effectively to correct the alleged conduct when the conduct was reported, the two lower courts determined that JELD-WEN had established the affirmative defense to vicarious liability recognized by this Court in *Faragher* and *Ellerth*. Plaintiffs are unable to directly attack the determination of the two lower courts so Plaintiffs attempt to circumvent their failure to report through an allegation that a fellow employee, Cathy Thornton, had previously discussed

alleged harassment by Fetner with Joe Mendoza, a "group manager" at the facility.

The "group manager" position is akin to a foreman (first line supervisor) in JELD-WEN's hierarchy; Mendoza was neither Thornton's nor any of the Plaintiffs' immediate supervisor and it is undisputed that Mendoza only supervised six (6) employees, all general laborers, at the facility and he "coordinated" the work of two "groups" (column turning and finger joint) that included the six employees. The alleged harasser, Fetner, was also a group manager although he supervised more than thirty general laborers. The group manager positions reported to the Acting General Manager who, in turn, reported to the Coordinating General Manager who, in turn, reported to the Vice President who, in turn, reported to the President of this particular JELD-WEN group. Although Mendoza denies that any inappropriate conduct was ever reported to him[2],

Plantiffs' argument is essentially that a report to *any* JELD-WEN supervisor is sufficient to give JELD-WEN notice of the alleged conduct. Plaintiffs' argument is not supported by this Court's precedent or by the cases cited in Plaintiffs' brief seeking certiorari review:

> An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.

Faragher, 524 U.S. at 807.

JELD-WEN's policy was the "effective mechanism" referenced in Faragher and afforded its employees no fewer than five avenues to report alleged harassment. Plaintiffs' efforts in this case are nothing more than an effort to expand an already effective policy to fit the facts of their case; neither they nor Thornton reported the conduct in the manner designated by the policy which would have provided an opportunity to correct the behavior. Their efforts contradict the purpose of Title VII as interpreted by this Court: "Although Title VII seeks to make persons whole for injuries suffered on account of unlawful employment discrimination its primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." Faragher, 805-806 (internal quotes and citations omitted).

Plaintiffs also argue that, even in cases where the alleged harassment was overt and permeated a work location, the Eleventh Circuit has adopted a standard that restricts JELD-WEN and other employers from having notice of alleged harassment except in cases where notice is given under the terms of the policy. Plaintiffs' misstatement of Eleventh Circuit precedent will be addressed in the following section. However, notwithstanding the misstatement, Plaintiffs' own testimony negates the ability to credibly rely on a constructive notice theory of recovery. Fetner surreptitiously directed the alleged objectionable conduct towards the three Plaintiffs and other female employees in a manner that other management personnel would not be able to observe the conduct. For example, the most egregious alleged conduct was directed towards Ms. Thornton and was all directed towards her in her own work area, a large

room where she worked alone or with one other person who could not see her work station from his. The undisputed facts do not establish that the facility was permeated with overt harassment.

REASONS FOR DENYING THE PETITION

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI REVIEW UNDER RULE 10 BECAUSE THERE IS NO CIRCUIT CONFLICT.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Plaintiffs attempt to establish that there is a conflict between the Eleventh Circuit's decision in this case, based on Eleventh Circuit precedent, and the decisions of other United States courts of appeal. No circuit conflict exists. Plaintiffs cite five cases to support their argument that a conflict is present. None of the cited cases matches the facts of this case because each of the five cases involved direct notice to upper-level company management and senior-level human resources representatives, not alleged notice to a front-line supervisor who was not the reporting employee's immediate supervisor.

Petitioners' challenge to the Eleventh Circuit's decision amounts to nothing more than a claim that they should somehow be excused from complying with the employer's ". . .proven, effective mechanism for reporting and resolving complaints of sexual harassment." Faragher, 524 U.S. 775, 806-807. Under the rules of this Court and clear precedent construing those rules, Petitioners' asserted grounds for review fail to meet the high threshold for granting

a petition. The circumstances under which review may be granted have by necessity been narrowly drawn given the manifest impossibility of reviewing every case in which the lower court is alleged to have been wrong.

As noted, in the five cases cited by Plaintiffs, the court generally determined that the employer had notice because a senior-level management employee had notice of the conduct. The employer's harassment policy was mentioned in some but not all of the cases. In Erickson v. Wisconsin Dept. of Corrections, 469 F.3d. 600 (7th Cir. 2006), the Seventh Circuit held that the employer had prior notice of potential danger to the plaintiff-employee (who was raped on the job) because the employee previously informed *five* senior managers, including the employee's direct supervisor and human resources director, of prior threatening conduct by the offending person. In Howard v. Winter, 446 F.3d 559, 569 (4th Cir. 2006), the court held that the employee's report of alleged sexual harassment to a senior human resources representative was sufficient to put the employer on notice even though the employer's policy required that the report be made up the "chain of command". A key component of the Fourth Circuit's analysis was that the employee was a "senior member of the Human Resources Department" and not just "any NAVAIR employee." Id. In Randolph v. Ohio Dept. of Youth Serv., 453 F.3d 724, 735 (6th Cir. 2006), the harassed employee and co-workers made numerous complaints to their immediate supervisor and to a senior level supervisor who reported directly to the Superintendent. Based on the reports to senior level personnel, the Court held that the employee's failure to follow the employer's sexual harassment policy did

not bar their claim. In Curran v. AMI Fireplace Co. Inc., 163 Fed. Appx. 714, 716 (10th Cir. 2006), an employee's complaints to the employer's office manager and the general manager who supervised the office manager were sufficient to put the employer on notice. The policy at issue in the Curran case apparently only identified the Human Resources Manager and not the senior-level manager notified by the employee. Id. at 720. In Jackson v. Quanex Corp., 191 F.3d 647, 662 (6th Cir. 1999), the complaining employee reported some, but not all, of the complained of racial harassment to management and/or his immediate supervisor and the employer never responded to any of the conduct even though management had direct knowledge of slurs, graffiti and internal tolerance of discrimination through its own observation and failure to act. Id.

Similar to the cases upon which Plaintiffs rely in an effort to establish a circuit conflict but contrary to Plaintiffs' contention, the Eleventh Circuit has proven willing to permit claims to proceed even though the employee did not strictly comply with the reporting mechanism set forth in the employer's policy. Each case involved circumstances where there was some deficiency in the employer's efforts to prohibit and/or correct illegal harassment, conditions that are not present in the case for which writ is sought. In Dees v. Johnson, the employer acted promptly upon notice to end the harassment, just as JELD-WEN did in this case. However, the Eleventh Circuit reversed summary judgment for the employer based on earlier notices of the conduct by another employee to human resources and by a second other employee to members of upper management. 168 F.3d 417, 419-423 (11th Cir. 1999). Likewise, in Olson

v. Lowe's Home Centers, Inc., 130 Fed. Appx. 380, 390 (11th Cir. 2005), the Eleventh Circuit held that notice of harassment per the company's "open door" policy was sufficient to provide notice to the company of alleged harassment even though the notice provided under the terms of the open door policy did not strictly conform to the requirements of the company's harassment policy. Furthermore, the Sixth Circuit's Jackson decision is analogous to the Eleventh Circuit's decision in Miller v. Kenworth of Dothan, Inc., 277 F. 3d 1269, 1275 (11th Cir. 2002), wherein the Eleventh Circuit affirmed a jury's verdict that the employer was on notice because the service manager was present when ethnic slurs were directed at the plaintiff.

Plaintiffs' specific request is that the Eleventh Circuit should be required to apply a "totality of the circumstances" test in evaluating whether notice is effective. Petition for Writ of Certiorari, p. 10. In fact, the Eleventh Circuit does apply such a standard in appropriate cases. See Allen v. Tyson Foods, Inc., 121 F.3d 642, 647 (11th Cir. 1997) (reversing summary judgment for employee because lower court failed to evaluate the "totality of the circumstances" in assessing whether conduct was persuasive enough to put the employer on notice as required by Faragher). Thus, it is clear that the Eleventh Circuit does not impose an inflexible standard on reporting incidents of harassment and considers the totality of the circumstances in assessing whether the employer has knowledge. Rather the Eleventh Circuit's interpretation and application of the affirmative defense is consistent with this Court's decisions in Faragher and Ellerth wherein this Court recognized a need to balance the imposition of strict vicarious

liability on an employer for its supervisor's harassing conduct with the goal of encouraging the employer to maintain an environment free of prohibited harassment:

> While proof that an employer had promulgated an anti-harassment policy with complaint procedures is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Ellerth, 524 U.S. 742, 765, Faragher, 524 U.S. 775, 807-808

The Eleventh Circuit case law that has developed in this area and that is questioned by Plaintiffs in this case is consistent with this mandate. As a threshold query in the Faragher/Ellerth affirmative defense analysis, the employer must have an *effective* policy that includes, among other elements, sufficient reporting avenues:

> once an employer has promulgated an effective anti-harassment policy and disseminated that policy and associated procedures to its employees, then it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances.

Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1300 (11th Cir. 2000); Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1364 (11th Cir. 1999) (noting requirement of an adequate and reasonable sexual harassment policy). In following this Court's decision and requiring an effective policy as a threshold to the defense, the Eleventh Circuit has addressed the concerns expressed by the Plaintiffs in this matter and, at the same time, balanced the respective interests of the employer and employee: the employee has a right to be free of harassment but the employer has an opportunity to correct deviations from its effort to maintain a harassment-free environment. However, in cases such as this one where the alleged harassment is outside the presence of management, it is only through the employees' reports that the employer will have the opportunity to remedy workplace harassment. There is no circuit conflict on this issue and there is no compelling reason to grant the writ.

II. THE ELEVENTH CIRCUIT RECOGNIZES CONSTRUCTIVE NOTICE IN APPROPRIATE CASES REGARDLESS OF THE MERE EXISTENCE OF A POLICY.

Plaintiffs' second argument is closely related to the first. They argue that the Eleventh Circuit's standard completely eliminates any avenue for the employer to be held to have constructive notice of prohibited harassment where the employer has a policy prohibiting harassment. Plaintiffs argue that "[t]he Eleventh Circuit's approach would allow an employer to avoid responsibility, when it has notice, based on its own policy, drafted as much to avoid liability than to prevent harm to its employees." Petition for Writ of Certiorari, p. 21. Plaintiffs' argument fails to consider that, contrary to their argument, Eleventh Circuit precedent does not foreclose notice simply because the employer has a "policy" under appropriate facts. Rather, as noted above, the threshold inquiry is whether the employer has an *effective* policy. The employer will be held to have notice if the "policy" is not an effective policy, either in its design or its enforcement. See Watson v. Blue Circle, Inc., 324 F.3d 1252, 1259-1261 (11th Cir. 2003) (reversing summary judgment for employer because employer's policy was ineffective thus constructive knowledge could attach).

Likewise, other circumstances can also warrant exceptions in the Eleventh Circuit. For example, where the conduct considering all relevant circumstances is sufficiently prevalent that the employer's upper management is on notice of the conduct, the Eleventh Circuit has held that the

employer has notice of the conduct notwithstanding that the employer has a policy in place and that the employee failed to properly report the conduct. Miller v. Kenworth of Dothan, Inc., 277 F. 3d 1269, 1275 (11th Cir. 2002) (employer liable where service manager observed conduct and overhead ethnic slurs directed at the plaintiff and did nothing to correct behavior). However, such circumstances were not present in this case as no other manager witnessed Fetner's conduct and it is clear that the Eleventh Circuit's threshold requirement of an effective policy is consistent with this Court's standards as set forth in Faragher and Ellerth. To the extent plaintiffs argue that there should be some pure constructive notice of alleged harassment, this Court addressed that contention in Faragher and Ellerth by requiring that the policy and the employer's enforcement and corrective measures be adequate to prevent and properly correct alleged harassment. Again, there is no compelling reason to issue the writ.

III. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE LAW IN THIS ACTION

JELD-WEN's policy prohibiting harassment satisfies the standards announced in this Court's decision in Ellerth: the employee is permitted to report alleged harassment to his or her supervisor and up the reporting line through JELD-WEN's hierarchy. See Ellerth, 524 U.S. 742, 760-765. Notwithstanding that each plaintiff and Ms. Thornton all were aware of the proper reporting structure, they failed to report the alleged conduct per the terms of the policy. Accordingly, they were afforded ample opportunity to avoid harm, yet failed to take advantage of the opportunity. When the conduct was

finally reported, JELD-WEN acted swiftly to correct the behavior and insolate its work site from illegal harassment. The Eleventh Circuit's analysis is consistent with Faragher and Ellerth.

CONCLUSION

There is no compelling reason to grant Petitioners' writ in this matter. As demonstrated herein, there is no circuit conflict and the Eleventh Circuit' interpretation and application of the law in this area are consistent with this Court's precedent. Accordingly, the writ is due to be denied.

Respectfully submitted,

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